The appellant's right to come to this court is provided in section 67 of the Courts of Judicature Act, 1964, in the following words:—

"The Federal Court shall have jurisdiction to hear and determine appeals from any judgment or order of any High Court in any civil matter, whether made in the exercise of its original or of its appellate jurisdiction, subject nevertheless to the provisions of this or any other written law regulating the terms and conditions upon which such appeals shall be brought."

Since in this appeal no grounds are pleaded which question the correctness of the decision of the High Court no right of appeal to this court appears to me to have arisen and I am of opinion that this court cannot therefore entertain the appeal.

Appeal dismissed.

Solicitors: *Lim Kean Siew & Co.; Lim, Lim & Oon.*

KARAM SINGH v. PUBLIC PROSECUTOR

[F.C. (Barakbah L.P., Azmi C.J. (Malaya), Ong Hock Thye F.J.) March 6, 1967]

[K.L. — Federal Court Criminal Appeal No. X.41 of 1966]

Penal Code s. 302 — Murder — Circumstantial evidence — Contradictions in evidence of key prosecution witness — Hearsay evidence — Admissibility of.

Criminal Procedure — Summing up to jury — Failure of prosecution to prove threat — Witnesses not made available to defence — Adverse presumption against appellant — Criminal Procedure Code, (Cap. 6), s. 214(iii) — Duties of trial judge thereunder.

Evidence — Circumstantial evidence — Hearsay evidence — Evidence Ordinance, 1950, ss. 8, 32(1) and 103.

The appellant was convicted of murder and sentenced to death under section 302 of the Penal Code. His conviction was based entirely on circumstantial evidence. At the trial, the deceased's son gave evidence that his father had told him of a quarrel between him and the appellant on the night before he was killed. He contradicted his evidence under cross-examination on several material facts. It was alleged that there were threats uttered by the appellant, on the fatal night. and that abuse preceded the threats. It was also alleged that there were 30 to 40 independant witnesses, who have heard the murderous threats uttered. None of them was called as a witness, and the learned trial judge's directions were as follows: "If the police have taken statements from witnesses, they have to produce them as witnesses if they are of any assistance to the prosecution case. If they do not wish them to be called as their witnesses, they are under a duty to make them available to the defence. From the record of the preliminary enquiry I see that the prosecution had made eight witnesses available to the defence". The learned trial judge in the course of summing up also commented upon the failure of the defence to tender evidence to prove that no threat had been uttered by the appellant.

Held: (1) all the evidence of the deceased's son even if true, being hearsay, was inadmissible and should not have been allowed to influence the jury in arriving at their verdict;

(2) at the close of the prosecution case, there was nothing on the record to show that any of the persons said to have been made available to the defence at the preliminary enquiry were tendered or made available at the trial. From the failure of the prosecution to call material witnesses the jury were in effect directed that they could, if they so desired, draw an unfavourable inference against the appellant, since he could have called them to prove that no threats were uttered in their presence and hearing as alleged. This again was a misdirection of a grave and prejudicial nature;

(3) there was nothing in the summing up said in favour of the appellant when much could be said in the appellant's favour. The fact that he went straight to his own house knowing he was seen, was itself a refutation of the allegation that he was running away and more consistent with innocence than guilt;

(4) the real question which the jury had to decide was whether or not the explanation given by the appellant as to the blood stains on his shirt and trousers might reasonably and probably have been true. In effect the jury were told to decide whether or not they believed the appellant — a wrong criterion as to onus;

(5) the direction as to the failure of the appellant to protest his innocence at the first reasonable opportunity hardly set out the facts in true perspective. The jury had wrongfully assumed that the accusation was made before the crowd and so long as this remained uncorrected in the minds of the jury the direction was highly prejudicial to the accused;

(6) in a case where the prosecution relies on circumstantial evidence, such evidence must be inconsistent with any other hypothesis than that of the guilt of the accused. The judge had omitted to view the relevant facts from all angles and the case was not put to the jury in a way to ensure due appreciation of the value of the evidence. There had been a miscarriage of justice and the appeal must be allowed.

Observations on the standard of proof required from the prosecution at the end of the presentation of its case.

Cases referred to:—

(1) *In re Eddula Venkata Subha Reddi*, (1931) I.L.R. 54 Mad. 931; A.I.R. 1931 Mad. 689.

(2) *In re Ravupalli Ramamurthy*, A.I.R. 1941 Mad. 290, 291.

(3) *Mahinder Singh* v. *Public Prosecutor* [1967] 1 M.L.J. 126.

(4) *R.* v. *Thomas Finch*, 12 Cr. App. R. 77, 79.

(5) *R.* v. *Bundy*, 5 Cr. App. R. 270.

(6) *Soo Sing* v. *Public Prosecutor* [1951] M.L.J. 143.

(7) *R.* v. *Koh Soon Poh* [1935] M.L.J. 120, 122.

(8) *R.* v. *Attfield* [1961] 1 W.L.R. 1135.

FEDERAL COURT.

Dato' David Marshall (*V. Jeyaratnam* with him) for the appellant.

Abdul Kadir bin Haji Mohamed Kassim (Deputy Public Prosecutor) for respondent.

Ong Hock Thye F.J.: The appellant appealed against his conviction in the High Court at Ipoh of the murder of one Mohan Singh, a mental hospital attendant, for which he was sentenced to death under section 302 of the Penal Code. We allowed his appeal and now state the grounds of our decision.

According to the charge the murder was alleged to have been committed between 5 a.m. and 5.50 a.m. on April 29, 1966, that is to say, before day-break. There was no eye-witness of

the actual attack on the deceased; the prosecution case was based entirely on circumstantial evidence. The leading, and indeed only, witness for the prosecution who made any direct allegation against the appellant was Harbans Singh, an 18-year-old son of the deceased, who admitted that, because he saw the appellant about to enter his own quarters two doors away from where the deceased was found murdered in his sleep, he (the witness) assumed that the appellant was the assailant. Since Harbans Singh was the key prosecution witness, his evidence needs to be scrutinised with the utmost care.

In a block of attendants' quarters, housing six families, which are connected by a common outside corridor, the first billet was occupied by the deceased, the second by Duraiappan, another attendant, and the third by the appellant. A road runs past the immediate front of the building. The deceased slept on a charpoy placed on the corridor outside his front door, while his son slept indoors, with the door shut but not bolted. The appellant's own front door was a mere 17 feet from the charpoy.

There was no evidence of any previous ill-will between the deceased and the appellant prior to discovery of the murder. But at about 8 p.m. on the previous night, there had been a quarrel between the wives of the appellant and Duraiappan over the use of a common stand-pipe. These two families had not been on talking terms for some time past. Two hours later, when the appellant returned home from duty at about 10.10 p.m. it was alleged by Harbans Singh that he came back shouting and abusing, not only Duraiappan, but also Kernail Singh (another attendant living in the next block) and the deceased. Why these two persons should have incurred his wrath was never disclosed or explained. The appellant was alleged to have challenged each of them by name to come out and fight, and Harbans Singh further testified that the appellant was shouting aloud that one of them was certain to meet his death that very day: "Ini hari tiga orang, satu orang mesti mati." Duraiappan alone accepted the challenge and there appeared to have been a heated argument during which the husband and wife on each side brandished various offensive weapons, but without coming to blows. Kernail Singh was not then at home, having left at 9.45 p.m. to go on duty at 10 p.m., while the deceased neither replied nor came out: he was coolly unconcerned with the disturbance outdoors. His attitude may be summed up in the words quoted by his son, that he had no quarrel with anybody: in fact he had so little anxiety about the whole affair that he still preferred to sleep out in the corridor.

Harbans Singh's evidence, in so far as it spoke of two separate scenes on the same night, was confirmed by the evidence of sergeant Ismail bin Lazim, who visited the quarters twice to ensure that there was no breach of the peace. Of the alleged threat to kill, there was supporting evidence only by Harbans Kaur, elder sister of Harbans Singh, and by Kamalachi, wife of Duraiappan, but not by Duraiappan himself, who merely spoke of the appellant abusing the three persons and challenging them to come out and fight. It is significant that, since Duraiappan had been personally threatened with death along with Kernail Singh and the deceased, he should naturally have considered himself the most probable victim as the active and direct participant in a confrontation of arms with the appellant. He should have felt the greatest concern for his own personal safety. Yet he said nothing of the threat to his own life; neither he nor his wife made any report or complaint to sergeant Ismail bin Lazim of such threat — and a woman, by nature, is not a reticent creature; no one among the crowd of 30 or 40 who were alleged to have heard the threats uttered was found to testify: and even Harbans Singh himself, who said that the threats caused him such anxiety about his father's safety that his sleep was disturbed, had made no report thereof to the sergeant when the latter came to the spot to restore peace and quiet. The question, therefore, that must be asked and answered, after careful weighing of all relevant evidence, was whether or not it should have been seriously doubted that there was any such threat at all. On this point more will be said later.

Harbans Singh went on to say that the deceased had "had quarrels with the appellant over the use of the stand-pipe"; that, on the other hand, "the deceased and Duraiappan had had no quarrels with each other; they were friends but not close friends" and that the appellant "had alleged during the frequent quarrels between himself and Duraiappan that the deceased had instigated Duraiappan to assault him." In categorical terms Harbans Singh said, "I witnessed these quarrels."

If true, and if admissible, such evidence must have been gravely prejudicial to the appellant. First of all, let us check each allegation for truth before the question of admissibility is considered. Of the quarrels at the standpipe, in fact Harbans Singh knew nothing at first hand. This was elicited in his cross-examination when he said: "My father told me about his quarrels with the accused in the town." It will be noted that quarrels in the town were not quarrels at the standpipe. "I did not witness any quarrel between accused and deceased." He went on to admit saying at the preliminary enquiry: "Prior to the 28th of April there was no reason for the accused to have caused hurt to my father," thus clearly contradicting himself.

As to the frequent quarrels alleged to have occurred between the appellant and Duraiappan at the instigation of the deceased, Duraiappan

said: "Prior to 28th of April, 1966 my wife has had quarrels with accused's wife. *I did not have any quarrel with accused prior to that day.*" In the teeth of this flat contradiction by Duraiappan, was the statement of fact by Harbans Singh, "I witnessed these quarrels", true or false? There can be only one answer.

Turning next to the question of admissibility, Harbans Singh revealed, under cross-examination, that he had in fact not witnessed any quarrel between his father and the appellant; he was only told by his father. This, of course, was hearsay and inadmissible, whether relying on section 8 or section 32(1) of the Evidence Ordinance. The headnote to *In re Eddula Venkata Subba Reddi* [1] states the law so neatly that we shall not attempt to paraphrase it:—

> "Where a statement by a deceased person is said to constitute a motive for another to commit a crime, it cannot be proved by one who heard the deceased make the statement.
>
> Such a statement will be admissible under section 32(1) of the Indian Evidence Act (1 of 1872) if it be a statement as to the cause of death or as to any of the circumstances of the transaction which resulted in death or under explanation 1 to section 8 of the Act if it is shown to have accompanied or explained any act of the deceased.
>
> There is nothing in section 8 to indicate that a relevant fact can be proved by hearsay evidence."

See also, *In re Ravupalli Ramamurthy* [2] where it was held that the evidence of a witness testifying that one deceased had shown a knife to another deceased (both victims of the double murder) with the remark that the accused was threatening to kill her with it was held inadmissible because such evidence did not relate "to any of the circumstances of the transaction which resulted in her death."

As to the events which occurred before dawn on April 29, Harbans Singh's story was that he had had a restless night, sleeping but fitfully because of anxiety. At 2 a.m. and 3 a.m. he had gone out to see his father wrapped in sleep. He was lying awake when, at about 5.30 a.m. he heard his father call out his name in a choking voice. He switched on the light and rushed out. He explained: "Whenever my father called me I always rushed out." But he could not say how many seconds it took him to get out of bed and rush out. Then he saw the appellant running away from near the bed of the deceased and enter his own quarters, a distance of 17 feet. He saw the appellant having something in his hand, an object about 20 inches long, but could not say what it was. Apart from the deceased and the appellant he saw no one. He came to the conclusion he did in these words: "It is correct I saw the accused entering his house that early morning. Because I saw him I assume he was my father's assailant." He had not seen the appellant strike any blow: his assumption was based merely on the appellant's presence in the immediate vicinity of the body.

Other relevant circumstances appearing in Harbans Singh's evidence were: that the distance between the deceased's charpoy and the side lane was only two feet; that had the assailant, whoever he was, gone into the lane, he would have been out of sight to Harbans Singh; that when Harbans Singh heard the deceased call him by name the tone did not suggest to him that something had happened to his father; that he did not hear any running footsteps on the right side of the quarters, which footsteps he could and should have heard if somebody were running in that direction. Most significant of all, however, after the wealth of detail adduced to prove that he was awake before hearing his name called, is the fact that he had heard no sound of any blow or blows struck, either immediately before or after his father called out to him. The deceased was killed by two violent blows, according to the medical evidence, one of which fractured the left frontal bone along the forehead and penetrated the left orbital fossa, opening up 2 inches of the brain, while the other also cut right through the brain into the lateral ventricle. If Harbans Singh were in fact awake, as he claimed, and he did hear his name called, whether an instant before or after the delivery of blows which were hard enough to fracture the skull, then it can be asserted without any fear of contradiction that the sound of such blows could not have failed to reach his ears. Consequently, we are of opinion that Harbans Singh's evidence must be regarded with the greatest reserve. If he failed to hear sounds he must have heard, had he been awake, the inescapable conclusion is that he was fast asleep when the blows were struck and that he woke up naturally — not in response to any call by his father. Hence, the mere presence of the appellant in the vicinity was not by itself such an incriminating circumstance as to be any evidence of his guilt, since it was impossible to say how much earlier the sleeping man had been murdered before the appellant passed by to bring the morning milk home.

It is true that the prosecution relied on other circumstantial evidence besides that of the appellant's presence in the vicinity of the corpse. The trial judge summed up the circumstantial evidence pointing to the guilt of the appellant as follows:—

> "(i) The relationship between the accused and the deceased prior to his death, that they were not on friendly terms, that the deceased had had quarrels with the accused in town.
>
> (ii) The threat uttered by the accused that night and the abuse that preceded the threat.
>
> (iii) The accused was seen walking fast as if he was running away from the scene of the crime.
>
> (iv) The blood stains found on his shirt and trousers.

(v) The failure of the accused to protest his innocence at the first reasonable opportunity afforded to him.

(vi) The concealment of the axe."

It will be convenient at this stage to deal with these points in the same order. First, as to ill-will, enough has already been said above that all the evidence of Harbans Singh on this point, being hearsay, was inadmissible and should not have been allowed to influence the jury in arriving at their verdict. No more elaboration is required.

Secondly, as to the threats and abuse, the fact which should not be overlooked is that the evidence of Duraiappan, who was one of the three alleged to have been threatened with death, significantly omits all mention of any such threat. Sergeant Ismail bin Lazim, whom one would naturally except to have been told of such serious threats, received no complain or report when he arrived there for the specific purpose of preventing a breach of the peace. In addition, there were 30 to 40 independent witnesses, said by Harbans Singh to have heard the murderous threats uttered. None was called as a witness and the learned trial judge's directions were as follows:—

"If the police have taken statements from witnesses, they have to produce them as witnesses if they are of any assistance to the prosecution case. If they do not wish them to be called as their witnesses, they are under a duty to make them available to the defence. From the record of the preliminary enquiry I see that the prosecution had made eight witnesses available to the defence."

At the close of the prosecution case, we find nothing on the record to show that any of the persons said to have been made available to the defence at the preliminary enquiry were tendered or made available at the trial. In our view this again was a misdirection of a grave and prejudicial nature. From the failure of the prosecution to call material witnesses the jury were in effect directed that they could, if they so desired, draw an unfavourable inference against the appellant, since he could have called them to prove that no threats were uttered in their presence and hearing as alleged. Section 103 of the Evidence Ordinance clearly provides that "the burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person." The burden of proving material facts in a criminal case lies on the prosecution and this burden never shifts on to the defence. Since the prosecution had alleged as a fact that the threats were uttered in the presence and hearing of 30 to 40 persons, the onus of proving such fact lay on the prosecution to call at least a few members of the crowd as witnesses. Because the defence did not call any such witness, however, no adverse presumption can be drawn from their failure to deny or refute an allegation of fact which the prosecution, by relying on it, had undertaken the onus of proving but had failed or neglected to do. On the contrary, the learned trial judge's direction should have called the attention of the jury to the omission of Duraiappan, one of the threatened victims himself, to corroborate the allegation, to the absence of any report to the police sergeant who came to the spot during the heat of the quarrel, and to the failure of the prosecution to call any of the crowd, when deciding whether or not any threat was made.

Thirdly, as further incriminating circumstantial evidence, it was said that the appellant was running away from the scene of the crime. It may be noted that Harbans Singh, 18 years old and a student in Form Two would not say, under cross-examination, whether he knew the difference between walking fast and running. We cannot help thinking that this was an unnecessary act of prevarication. It could hardly have mattered one way or the other, since the distance from the charpoy to the appellant's own door was only 17 feet, which could have been covered in a few long strides. But when a fact is summed up in a few words as an incriminating circumstance, we should have thought that the jury ought, in fairness to the accused, be directed also as to the other side of the picture. The alleged murderer was said to be running away from the scene of his crime. What had to be pointed out, just as plainly, was that he did not run away into the night, but into his own house, making no attempt whatever to hide his identity or cover his tracks. We have carefully looked through the summing up, but we could find nothing said when much could have been said in the appellant's favour. The fact that he went straight into his own house, knowing he was seen, was itself a refutation of the allegation that he was running away and more consistent with innocence than guilt.

Fourthly, the bloodstains on the appellant's shirt and trousers were said to be further incriminating evidence. The appellant's explanation was that he had been accidentally struck on the nose in a scuffle between two mental patients, and the nose-bleed accounted for the stains. We do not think the defence could be fairly expected to call mentally deficient or instable persons as witnesses because no one could safely consider them predictable. The concluding words in the directions were: "The accused said that although it was his duty to report the incident to his superior he did not do so because no patient was hurt. What do you think of that?" With respect, we cannot help feeling that the underlying note of scepticism could not have failed to have some influence on the jury. The real question which they had to decide was whether or not the explanation might reasonably and probably have been true. In effect, however, they were told

to decide whether or not they believed the appellant — a wrong criterion as to onus.

Fifthly, it was pointed out that the appellant had failed to protest his innocence at the first reasonable opportunity. This point arose out of a question put to Harbans Singh by the jury.

Q. Was there a crowd at the scene? Did the accused come out to deny your accusation?

A. The accused did not at any time come out to deny my accusation.

Now, it was in evidence that when Harbans Singh first shouted his accusation of the appellant, there was no crowd at all, nobody there in fact, and Kamalachi was the first to come out. As against the word of Harbans Singh alone, there was the appellant's contradiction on oath, that he did then come out and deny when he heard Harbans Singh say, "I think he killed my father." There is, however, not a shred of evidence on the record that, when the crowd gathered subsequently, Harbans Singh either repeated his accusation then, or that he did so in a voice loud enough to carry to the appellant's ears indoors, while the appellant was still at home. Unless it was proved that the appellant was aware of the accusation made to the crowd, we do not see why the appellant was bound to come out and deny any charge of which he knew nothing. Unfortunately, the directions were to this effect:—

"You have to decide as a matter of fact whether the accused did come out to protest against the serious accusation made against him by Harbans Singh. You will recall, if you accept Harbans Singh's evidence, that he shouted that the accused had attacked his father or words to that effect. Don't you think as a matter of ordinary common sense that if someone accuses you of committing a serious crime such as this, you would, on hearing such unfounded accusation (if you think it is unfounded and untrue), protest or deny at the earliest opportunity? If you accept the prosecution evidence that the accused did not come out and protest against the accusation, don't you think that that may be something unfavourable against him? That may be of some importance for you to consider in arriving at the guilt of the accused."

In our view the directions hardly set out the facts in true perspective. The jury, as their question clearly showed, had wrongly assumed that the accusation was made before the crowd. So long as this misconception remained uncorrected in the minds of the jury, we are bound to say, with the greatest respect, that the direction on this point was again highly prejudicial to the appellant.

Finally, there is the matter of concealment of the axe. Assuming, for the sake of argument, that it was satisfactorily proved that the axe belonged to the appellant, the direction as to its concealment being an incriminating fact was as follows:—

"If you decide that the axe does belong to the accused, what is the proper inference to be drawn from the fact that it was concealed in the hibiscus hedge? Does it show consciousness of guilt? It is a matter of fact for you. You have also to consider whether, in the light of the injuries sustained by the deceased, that axe could have caused those injuries."

The fact that there were no traces of human blood on the axe was, however, dismissed in these few words: "You have also to bear in mind that the axe had no bloodstains or finger-print impressions on it." *Prima facie*, of course, an axe without any trace of blood thereon was no more the murder weapon than any of the other three axes and two parangs found in the appellant's house by A.S.P. Sarjit Singh. The prosecution were unable to offer any plausible explanation for suggesting that it was the murder weapon, although it had no bloodstains. In a case where the prosecution relies on circumstantial evidence, such evidence must be inconsistent with any other hypothesis than that of the guilt of the accused. But was the hiding of the axe in the hedge only consistent with the appellant's guilt? What if it had been stolen by someone who had hidden it there until a more convenient moment to take it away? In Dr. Underwood's opinion this axe was not the weapon used, and he was not challenged or cross-examined by the learned deputy public prosecutor on this point. He stood uncontradicted. In the result the learned trial judge ultimately directed the jury regarding the axe in question in these terms:—

"Coming to the axe, the doctor is of the opinion that the axe could not have caused the incised wound No. 1 because the axe in question is not a very sharp weapon Gentlemen, you may think that the injuries were sustained from a sharp-cutting weapon, and if that is so, a sharp-cutting weapon was used to cause those injuries. Now, if you are satisfied beyond reasonable doubt that it was none other than the accused who had inflicted those ghastly injuries, does it not then follow that he might have used a sharp-cutting weapon? If you decide that, does it matter if the axe was the actual weapon used or not?"

Once it had to be conceded that the axe was not the lethal instrument used, we asked ourselves: How then, could the finding of this axe in the hibiscus hedge be a piece of incriminating circumstantial evidence? If this fact ceased to be a piece of incriminating evidence, should not the jury have been directed accordingly?

The defence may be summed up in a few words. The appellant had had neither ill-will towards nor quarrel with the deceased and hence no motive to kill him. In the usual early hours of the morning he had gone to milk his cows and bringing home the milk, his usual route to his own home took him past the front door of the deceased. He did not deny that he was in the vicinity of the body before reaching his own doorstep, but in the dark he had not noticed anything unusual until he heard the screams of Harbans Singh. In our opinion, his sworn testimony was in every respect consistent with the

prosecution evidence and his innocence. With the greatest respect, the directions given regarding the defence seem to us quite inadequate.

To conclude, we think it not out of place to refer to a recent judgment of this court delivered on October 3, 1966 in the case of *Mahinder Singh* [3] where we said:—

"With respect, we think that the judge had taken too narrow a view. It was not sufficient merely that the complainant appeared quite certain in his own mind that the accused was his assailant. It was clearly necessary for the court to examine also the grounds of his belief before regarding the question as closed."

The jury, in our opinion, should have been directed accordingly, since Harbans Singh had clearly admitted that he jumped to his conclusion as to the appellant's guilt from the mere fact of his presence. On this point we think non-direction amounts to misdirection: see *Thomas Finch.*[4] Repeating what Avory J. said in that case, we are of opinion that the jury were entitled to have the assistance of the presiding judge in directing them, and that, in the words of Pickford J. in *Bundy* [5] "the trial was not satisfactory, and the case was not put to the jury in a way to ensure their due appreciation of the value of the evidence." In these circumstances a miscarriage of justice may well have occurred. We therefore came to the conclusion that this appeal must be allowed, and the conviction quashed.

Before concluding, we think we ought to respond to a request by Dato' Marshall that we express our views regarding a passage in the summing-up, as follows:—

"Gentlemen, if, at the end of the prosecution case you are satisfied beyond reasonable doubt that the charge against the accused has been proved, then and only then do you consider the defence. But not otherwise. If at the end of the prosecution case you are not satisfied beyond reasonable doubt that it was the accused who had committed the murder, then you acquit the accused at that stage and you do not consider the defence."

With the greatest respect, we think that those directions relate exclusively to summary trials in the subordinate courts, to which section 173(f) of the Criminal Procedure Code will apply: see *Soo Sing* v. *Public Prosecutor.*[6] In trials by jury before the court of a judge, however, section 214 makes different provisions by reason of the dichotomy in the functions of judge and jury. It reads:—

"(i) When the case for the prosecution is concluded the court, if it considers that there is no evidence that the accused committed the offence shall direct the jury to return a verdict of not guilty.

(ii) If the court considers that there is evidence that the accused committed the offence the court shall call on the accused to enter on his defence.

(iii) The jury may return a verdict of not guilty either unanimously or by a majority at any time after the conclusion of the evidence for the prosecution if they consider the case to be one in which they could not safely convict."

Subsection (iii) was considered by the Court of Criminal Appeal over 30 years ago in *R.* v. *Koh Soon Poh,*[7] wherein Terrell J., delivering the judgment of the court, said:—

"In our opinion the subsection merely declares what was always the common law of England, namely, that after the jury have heard all the evidence for the prosecution they can stop the case if they do not think it would be safe to convict."

This intermediate problem, of the standard of proof required from the prosecution at the end of the presentation of its case, is one of considerable difficulty; as, where the court may not be completely satisfied that the prosecution has proved a case beyond doubt. An example is when the evidence adduced up to that stage is equally consistent with innocence as with guilt. (In fairness to the appellant, we hasten to add that the instant case is not one of this sort). In such a case, if the standard of proof is the same as that which applies after the defence has been heard, then, of course, the prosecution has failed to discharge the onus that rests on it, and the same consequences should follow as in a summary trial, by virtue of section 173(f). If, on the other hand, the standard required is that of a mere *prima facie* supposition that the accused may be guilty, then the trial ought to proceed.

In this quandary we think some light is shed on the problem by *R.* v. *Attfield,*[8] in which the headnote reads:—

"The defendant was charged with indecent assault on, and gross indecency with, two young boys. The case having begun late one afternoon, the prosecution completed their case the following day and the defendant gave his evidence. The recorder then invited the jury to stop the case which they declined to do. After a four-day adjournment two witnesses were called for the defence, counsel delivered closing speeches and the recorder summed up. In his summing-up the recorder directed the jury as to the law but did not refer to any of the evidence except as to the defendant's character. The defendant was convicted."

As a general rule, however, a jury hardly ever fails to accept an invitation given them by the judge to stop a case on the ground that it would be unsafe to convict. Where a judge thinks fit to take such a course, Terrell J. in *Koh Soon Poh,* with rare foresight, has provided what, with respect, we agree to be the best answer:—

". . . . if the case for the prosecution is not strong he may think it right to call the attention of the jury to their powers, but if he does so he should at the same time express his opinion that there is *some* evidence against the accused."

It contemplates the intermediate case. In the directions of the learned trial judge quoted above, only the two extremes were considered. We do not think that it is quite correct that evidence for prosecution and defence should be dealt with as though in distinct and water-tight compartments, and that evidence for the defence should not be taken into account simultaneously

with the prosecution evidence when material facts are being considered point by point. The process the jury were advised to adopt was fraught with risks of error and omission to view a relevant fact from all angles. The directions concerning the axe is as good an illustration as any.

Appeal allowed.

Solicitors: *Cheang Lee & Ong.*

CHOW KAY KONG v. CHING TONG & ORS.

[F.C. (Barakbah L.P., Azmi C.J. (Malaya) and Ong Hock Thye F.J.) March 6, 1967]

[K.L. — Federal Court Civil Appeal No. X. 81 of 1966]

Negligence — Motor accident — Conflicting evidence — One defendant admitting liability in magistrates' court — Whether this can be taken into account — Contributory negligence — Whether other defendants precluded.

Damages — Contributory negligence alleged against first defendant who had pleaded guilty in a criminal proceedings — Whether case of contributory negligence precluded.

Evidence — Admissibility — Conviction — Motor-car and lorry in collision — Negligence alleged against both drivers — Whether first defendant's plea of guilty rightly admitted as an admission.

A motor-car in which the plaintiff was a passenger collided with an oncoming lorry and as a result the plaintiff was seriously injured. He sued the driver of the car and the owners of the lorry, respectively the first and second defendants. The negligence alleged against one or the other or both of them was in identical terms. The first defendant entered no appearence. The second defendants denied all negligence on the part of their servant and alleged all negligence against the first defendant. The plaintiff and the second defendants were the only parties heard at the trial. At the trial there was conflicting evidence. The learned trial judge admitted in evidence the notes of proceedings in the magistrates' court where the first defendant had pleaded guilty to a charge of careless and inconsiderate driving under section 30(1) of the Road Traffic Ordinance and held the absent first defendant solely responsible. In this appeal the plaintiff sought to make the second defendants liable for contributory negligence. The main question raised in the appeal was whether the learned trial judge was right to treat the first defendant's plea of guilty to the charge preferred against him as an admission of such a nature as to preclude the court from entertaining a case of contributory negligence against the other defendants.

Held: as the first defendant had had every opportunity to explain his previous unqualified admission of liability and did not seek to lay the blame or part of the blame elsewhere, the trial judge was right in taking into account the first defendant's plea of guilty and precluding a case of contributory negligence against the other defendants. Further, where the evidence on both sides was so evenly balanced that the judge had to look for evidence elsewhere to decide the issue, it is abundantly clear that the appellant had failed to discharge the onus of proof which rested on him as plaintiff.

Cases referred to:—

(1) *Hollington* v. *Hawthorne* [1943] K.B. 27.

(2) *Ingram* v. *Ingram* [1956] 2 W.L.R. 782.

(3) *Robins* v. *National Co. Ltd. & Ors.* [1927] A.C. 515.

FEDERAL COURT.

Denis Murphy for the appellant.

J. McWilliam for the respondents.

Cur. Adv. Vult.

Ong Hock Thye F.J.: The appellant was a passenger in a motor-car which collided with an oncoming lorry on December 28, 1959. He suffered rather serious permanent injury to his right arm. Almost five years later he brought an action for damages against the driver of the car and the owners of the lorry, respectively the first and second defendants, alleging negligence, in identical terms, against one or the other or both of them.

The first defendant entered no appearance. The second defendants denied all negligence on the part of their servant or agent driving their lorry and alleged negligence against the first defendant in the manner pleaded by the appellant in his statement of claim, particulars whereof these defendants adopted.

In the event the appellant and the second defendants were the only parties heard at the trial before Ali J., who held the absent first defendant solely responsible and awarded damages against him with costs. As regards the successful second defendants' costs he made the *Bullock* order.

In this appeal it is now sought to make the second defendants liable for contributory negligence and I have little doubt that this is because the appellant has scant hopes of recovering from the first defendant.

As usual in such cases there was a strong conflict of evidence. The learned judge consequently felt it necessary to "examine other evidence to ascertain which of the two versions could be accepted." He found it in the notes of criminal proceedings arising out of the same accident for which the first defendant had been charged in the magistrates' court with an offence under section 36(1) of the Road Traffic Ordinance, 1959. He had pleaded guilty and been fined $30. I now quote from the judgment on this point:

"From the record of the proceedings he appeared to have admitted as correct the facts which were outlined by the prosecuting officer who had stated that the defendant's car was travelling on the crown of the road. How this fact came to be stated by the prosecuting officer is not necessary for me to enquire, but it remains established that the first defendant had admitted to the allegation that when the collision occurred he was travelling on the crown of the road. Such an admission in my opinion would be sufficient in view of the authorities cited to induce me to conclude that the first defendant was solely to blame for the collision. As this conclusion on liability is in accord with what has been pleaded by the plaintiff in this case (see paragraph 2 of the statement of claim) judgment was therefore